No. (1)

Supreme Court, U.S.
FILED

081374 MAY 5 - 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CHRIS ROBINSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL D. CROSS
Attorney at Law
1020 West Main Street
Post Office Box 99
Monteagle, TN 37356
(931) 924-2060

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether for purposes of satisfying the enhanced penalty provisions of 21 USC 841(b)(1)(A) and (b)(1)(B), factual findings regarding drug quantities must be defendant-specific for reasons of statutory construction, compliance with *Pinkerton vs. United States*, due process, or to avoid unconstitutional vagueness of jury instructions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B) 7

CONCLUSION 16

APPENDIX:

SIXTH CIRCUIT OPINION ..... App. 1

DISTRICT COURT JUDGMENT ..... App. 21

SIXTH CIRCUIT ORDER DENYING REHEARING ..... App. 32

EXCERPTS OF TRIAL PROCEEDINGS 10-2-06 ..... App. 33

TABLE OF CONTENTS – Continued

Page

EXCERPTS OF TRIAL PROCEEDINGS 10-3-06 ..... App. 38

EXCERPTS OF TRIAL PROCEEDINGS 10-3-06 (DISCUSSION REGARDING COMMUNICATION FROM JURY) ..... App. 41

TABLE OF AUTHORITIES

Page

CASES

Apprendi vs. New Jersey, 530 U.S. 466 (2000) 8, 9, 13, 14

Barbour vs. U.S., 543 U.S. 1102 (2005) 12

Edwards vs. U.S., 533 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) 9, 10, 11

Mack vs. U.S., 543 U.S. 1107 (2005) 12

Pinkerton vs. U.S., 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946) 8, 11, 14, 15, 16

U.S. vs. Alvarez, 755 F.2d 830 (11th Cir. 1985) 15

U.S. vs. Banuelos, 322 F.3d 700 (9th Cir. 2003) 7, 8, 9, 14

U.S. vs. Becerra, 992 F.2d 960 (9th Cir. 1993) 9

U.S. vs. Capps, 93-3718, 93-3719, 93-3720, 93-3721 (6th Cir. March 10, 1995) U.S. App. LEXIS 5195 ..... 14, 16

U.S. vs. Collins, 415 F.3d 304 (4th Cir. 2005) 7, 8, 13, 14

U.S. vs. Darwich, 337 F.3d 645 (6th Cir. 2003) 13

U.S. vs. Derman, 298 F.3d 34 (1st Cir. 2002) 10, 11, 12

U.S. vs. Irvin, 2 F.3d 72 (4th Cir. 1993) 8

U.S. vs. Knight, 342 F.3d 697 (7th Cir. 2003) 12

U.S. vs. Nelson-Rodriguez, 319 F.3d 12 (1st Cir. 2003) 11, 12

U.S. vs. Phillips, 349 F.3d 138 (3rd Cir. 2003) 12

TABLE OF AUTHORITIES – Continued

Page

U.S. vs. Pruitt, 156 F.3d 638 (6th Cir. 1998), *cert. denied* January 11, 1999 ..... 15, 16

U.S. vs. Robinson, 547 F.3d 632 (6th Cir. 2008) 1, 2, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16

U.S. vs. Stiger, 413 F.3d 1185 (10th Cir. 2005) 12

U.S. vs. Turner, 319 F.3d 716 (5th Cir. 2003) 12

STATUTES

18 USC Section 2 13

21 USC Section 841 ..... 7, 10, 13, 14, 15, 16

21 USC Section 843 4

21 USC Section 846 ..... 4, 6, 8, 9

28 USC Section 1254(1) 1

U.S. SENTENCING GUIDELINES

USSG Section 1B1.3 ..... 10, 12

USSG Section 5G1.1 10

U.S. CONSTITUTION PROVISIONS

U.S. Constitution Amendment 5 ..... 2, 12

U.S. Constitution Amendment 6 13

OPINION BELOW

The Sixth Circuit Court of Appeals issued its substantive opinion in this case November 4, 2008. That opinion is now reported as *U.S. vs. Robinson*, 547 F.3d 632 (6th Cir. 2008). This opinion is attached as Appendix pages 1-20. The Sixth Circuit case number was 07-5474, and the unofficial citation is 208 Fed. App. 0418P.

The Petitioner subsequently filed a petition for rehearing en banc in the Sixth Circuit. Rehearing was denied by Order filed February 5, 2009, a copy of which is set out in the Appendix at page 32.

The District Court did not publish an opinion; its judgment is set out in Appendix pages 21-31. Its case number was 4:06-cr-04. A pre-trial evidentiary ruling of the district court, not relevant to this petition, is available at 2006 U.S. Dist. LEXIS 71496.

JURISDICTION

The Sixth Circuit filed its substantive opinion November 24, 2008 and entered an Order denying Petitioner's petition for rehearing on February 5, 2009. This Court has jurisdiction under 28 USC Section 1254(1) to review this Circuit Court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 USC SECTION 841

(a) UNLAWFUL ACTS

Except as authorized by the subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

. . . .

(b) Except as otherwise provided in section 859, 860, 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

. . . .

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

. . . .

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

. . . .

such person shall be sentenced to a term of imprisonment which may be not less than 10 years or more than life . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.

. . . .

(C) In the case of controlled substance in Schedule I or II . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be

sentenced to a term of imprisonment for not more than 30 years. . . .

21 USC SECTION 846

ATTEMPT AND CONSPIRACY

Any person who attempts or conspires to commit any offense defined in this sub-chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the Court of first instance, the United States District Court for the Eastern District of Tennessee, is the federal indictment alleging that the Defendant had violated federal criminal statutes, 21 USC Sections 841(a)(1) and (b)(1)(A) and (B); and 21 USC Section 843(b). The asserted violation of 21 USC Section 841(b)(1)(B), concerning the distribution of marijuana, was abandoned by the government at trial, so there is no corresponding conviction and is therefore not at issue on appeal. Likewise, the alleged violations of 21 USC Section 843(b), though resulting in convictions, are not at issue on appeal. What is at issue is the 841(a) and (b)(1)(A) conviction involving cocaine and resulting in a life sentence (App. 23).

The superceding indictment in this cause charged Petitioner with being a member of a drug conspiracy which existed from on or about December, 2003 until on or about March of 2006. Mr. Robinson was charged along with 18 codefendants, all of whom were charged in Count 1, the conspiracy count; some of whom (but not Robinson) were charged with substantive – i.e. not conspiracy – counts of 21 USC 841(a); most or all, including Robinson, were charged with violations of 21 USC 843(b), use of a communication facility to facilitate a drug felony, a crime carrying by statute a maximum of four years of imprisonment.

The investigation which ultimately caught Mr. Robinson began with a wiretap of the telephone of Juan Valentin. This wiretap was monitored for 88 days. The total quantity of cocaine discernable from wiretap conversations between Valentin and Robinson was 38 and one-half ounces, slightly over one kilogram.

Law enforcement authorities testified at trial that, on two occasions, one of which was Valentin's arrest, he (Valentin) was known to have had quantities of three and five kilograms, of cocaine respectively, in his possession (App. 34-37). There was no evidence that Robinson was involved with either of these amounts or even knew about them.

In closing argument, AUSA Piper argued that the requisite five kilogram quantity for establishing a violation of 21 USC 841(b)(1)(A), which, in Robinson's case, would result in a life sentence owing to two

prior drug felony convictions, could be established by taking the Defendant's supposed per-week purchases from Valentin as discernable from the wiretap and multiplying that figure by the number of weeks the conspiracy existed, a process which would result in eight or nine kilograms (App. 39).

The jury charge instructed the jurors that the determination of whether the Petitioner was guilty as charged of 21 USC 846 and 841(a) and (b)(1)(A) was a two-step process, the second step requiring the jury simply to determine whether the offense "involved" the required five-kilogram amount (App. 40).

The jury was apparently unimpressed with the method Mr. Piper had suggested in his closing argument for arriving at the five-kilogram quantity threshold and, during deliberations, submitted a question to the Court, asking whether they could resort to quantities of which Petitioner was unaware handled by co-conspirators (App. 42, 45). What the jury had in mind as candidates for constituting the five-kilogram quantity is virtually guaranteed to have been either or both of the previously-referenced three and five kilogram quantities known by law enforcement to have been in Valentin's possession, since the proof suggested little if anything else.

Over the Petitioner's counsel's insistence that the response required the jury to find the Defendant to have knowledge of the transactions not involving him personally (App. 43-44), the District Court reiterated to the jury merely that the required five kilograms

must have been "involved in the conspiracy" (App. 45).

Chris Robinson was not the target, or at least not the "big target" of the investigation. The government never contended that Robinson operated at the same level in the drug business as Valentin, who dealt in large volumes of cocaine.

Petitioner was sentenced to life imprisonment (App. 23).

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B).

In the opinion appealed from, 547 F.3d 632 at 639-640 (2008) (App. 11-12), the Court acknowledged the circuit split on the question of whether the drug-quantity finding must be defendant-specific or conspiracy-wide, citing *U.S. vs. Collins*, 415 F.3d 304, 313-314 (4th Cir. 2005) and *U.S. vs. Banuelos*, 322 F.3d 700, 704-705 (9th Cir. 2003) as standing in opposition to the position taken by the Sixth Circuit in this case.

The Fourth Circuit in *Collins* succinctly framed the question: "Should an individual defendant, found guilty of conspiracy to violate Section 841(a) be sentenced under Section 841(b) by considering the amount of narcotics distributed by the *entire conspiracy*? Or should that defendant's sentence be more individualized, subjecting him to punishment only for distribution of the amount of narcotics *attributable to him*?", *Collins* at 312 (emphasis in original). That court noted that its prior decision in the case of *U.S. vs. Irvin*, 2 F.3d 72 (4th Cir. 1993) had required such findings to be defendant-specific; *Collins* effectively extended *Irvin* in the light of *Apprendi vs. New Jersey*, 530 U.S. 466 (2000). "*Apprendi* and *Promise* altered *Irvin's* holding by effectively replacing the words 'a district court' with 'the jury' and requiring proof beyond a reasonable doubt. Although *Apprendi* modified *Irvin* in this matter, *Irvin's* holding that *Pinkerton*[1] principles should be used to determine, for sentencing purposes, the amount of narcotics attributable to any one individual in a conspiracy, remains good law[.]" *Collins* at 314.

In *Banuelos*, the Ninth Circuit, in a 21 USC 846/841(a)(1) prosecution, noted that it was accepted in that circuit that a statutory mandatory minimum

---

[1] The reference is to the case of *Pinkerton vs. U.S.*, 328 U.S. 640 at 647-48 (1946), which holds that a member of a conspiracy may be held criminally liable for the reasonably foreseeable crimes committed by other members of the conspiracy during the course and in furtherance of the conspiracy. (Footnote added.)

sentence could not be imposed without a finding that "a particular defendant had some connection with the larger amount on which the sentence is based or that he could reasonably foresee that such an amount would be involved in the transactions of which he was guilty", *Banuelos* at 704, quoting *U.S. vs. Becerra*, 992 F.2d 960, 966-67 & n. 2 (9th Cir. 1993). The *Banuelos* court restated the standard: "[T]he district court was required to find not only that the conspiracy distributed a particular type and quantity of drugs, but also that the type and quantity were either within the scope of Banuelos' agreement with his coconspirators or that the type and quantity were reasonably foreseeable to Banuelos", *Banuelos* at 704.

So far as the undersigned has been able to determine, the closest this Court has come to addressing this issue is the case of *Edwards vs. United States*, 533 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998). In that pre-*Apprendi* case, the defendant had been charged under 21 USC Sections 841 and 846 with conspiracy to distribute both cocaine and cocaine base. The jury verdict was silent as to which substance Edwards was guilty of having conspired to distribute. The Court noted that the guidelines required the judge to make this determination. "Virtually conceding this Guidelines-related point, petitioners argue that the drug statutes, as well as the Constitution, required the judge to assume that *the jury* convicted them of a conspiracy involving *only* cocaine. Petitioners misapprehend the significance of this contention, however, for even if they are correct, it would

make no difference to their case", *Edwards* at 514, 1477 (emphasis in original).

The reasoning was that the sentencing guidelines instruct the judge to base a drug-conspiracy offender sentence on relevant conduct (USSG Section 1B1.3), which would include, in that case, both the (powder) cocaine and the much-more-harshly punished cocaine base.

Of particular significance to the present case, however, is the following: "Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy", *Edwards* at 515. When quantity is substituted for type as the triggering criterion for enhancement under 841(b)(1), the facts of *Robinson* fit this scenario perfectly: The maximum sentence permissible under 841(b)(1)(C) of 30 years, applicable where the cocaine amount is unspecified, is lower than the minimum sentence (of life, for Robinson) under 841(b)(1)(A). " . . . [A] maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG Section 5G1.1", *Edwards* at 515.

The Sixth Circuit in its opinion in this case relies substantially on the First Circuit case of *U.S. vs. Derman*, 298 F.3d 34 (1st Cir. 2002). The First Circuit, basing its decision to some extent on *Edwards*, held that

> . . . the jury should determine the existence *vel non* of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine, at sentencing, the particulars regarding the involvement of each participant in the conspiracy. *Edwards*, 523 U.S. at 514, 118 S. Ct. 1475. This means that once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge may lawfully determine the drug quantity attributable to that defendant, and sentence him accordingly (so long as the sentence falls within the statutory maximum made available by the jury's conspiracy-wide drug quantity determination).

In the subsequent case of *U.S. vs. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003), that court, noting that "*Derman* itself involved a relatively simple conspiracy" (*Nelson-Rodriguez* at 46) retreated from *Derman*: "That simple approach may break down for more complex conspiracies involving multiple transactions of different amounts of drugs imported at different times, with a shifting cast of actors . . . There may be one conspiracy; there may be multiple conspiracies. Or a defendant may raise *Pinkerton* issues . . . Some of these problems might be solved by more specificity in indictments, by tailored instructions,

and by special verdicts[.]" *Nelson-Rodriguez* at 46-47. " . . . [W]e recognize that [*Derman*] is not necessarily the last word on the subject." *Id.* at 46.

The *Robinson* opinion cites the cases of *United States vs. Phillips*, 349 F.3d 138, 142-43 (3rd Cir. 2003), *vacated and remanded on other grounds sub nom. Barbour vs. United States*, 543 U.S. 1102 (2005), *United States vs. Turner*, 319 F.3d 716, 722-23 (5th Cir. 2003), *United States vs. Knight*, 342 F.3d 697, 710 (7th Cir. 2003), *United States vs. Stiger*, 413 F.3d 1185, 1192-93 (10th Cir. 2005), *vacated and remanded on other grounds sub nom. Mack vs. United States*, 543 U.S. 1107 (2005) as being in accord on this issue with *Derman*.

In the more typical *Derman* scenario, the finding by the jury of a conspiracy-wide drug amount results in an elevated statutory maximum, with some semblance of fairness presumably supplied by the discretion of the judge to sentence below that statutory maximum based on the culpability of a particular defendant. With regard to Robinson, however, this safeguard does not exist, since the conspiracy-wide quantity mandated a life sentence as a *minimum* punishment. This absence of safeguards violates fundamental fairness and due process under the Fifth Amendment to the U.S. Constitution.

Even the U.S. Sentencing Guidelines (1B1.3(a)(1)(B)) impose a foreseeability limitation on relevant conduct: " . . . [A]ll reasonably foreseeable acts and omissions of others in furtherance of the jointly

undertaking criminal activity". Similarly, aiding and abetting requires that a defendant aid, abet, counsel, command, induce, or procure the commission of the crime, or willfully cause a criminal act, to be punishable as a principal; 18 USC Section 2.

The question of whether a defendant has a right under the Sixth Amendment, U.S. Constitution, to have a jury make the defendant-specific quantity determination was pretermitted in *Robinson*, which held that the determination did not have to be made at all. To the undersigned's knowledge, no Circuit which has held that defendant-specific findings are required has held or suggested that *Apprendi* would permit this determination to be made by a judge. This result would seem to be compelled; each of the subsections of 21 USC Section 841(b) constitutes a separate offense with separate elements which all must be proved beyond a reasonable doubt when a defendant guilty of a conspiracy is sentenced in excess of the default statutory maximum (set out in 841(b)(1)(D) in the case of marijuana), *U.S. vs. Darwich*, 337 F.3d 645, 655 (6th Cir. 2003). The remedy upon a failure would seem to be a resentencing under the default subsection of 841(b) applicable to an unspecified drug amount, 841(b)(1)(C) in the case of cocaine. Notwithstanding, the Fourth Circuit in the previously-cited case of *U.S. vs. Collins*, gave the government the choice between re-sentencing the defendant under the Section 841 default provision applicable to an unspecified amount of cocaine or a

reversal of the conspiracy conviction with the opportunity to retry the charge (*Collins* at 315).

In the previously-cited case of *U.S. vs. Banuelos*, 322 F.3d 700 (9th Cir. 2003), the issue was whether the district court, in sentencing for a conviction entered pursuant to a guilty plea, erred in applying a clear-and-convincing standard to the reasonably foreseeable/within scope of agreement requirement. The Ninth Circuit held this to be error noting also that *Apprendi* was violated as well, *Id.* pp. 704-706 and n. 3. The error was not harmless since the improperly-made quantity determination resulted in a doubling of the defendant's sentence over the otherwise-applicable statutory maximum sentence of five years, *Id.* p. 706. The remedy was resentencing pursuant to the proper standard, *Id.*

The case of *Pinkerton vs. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946) stands as authority for the proposition that one conspirator may be criminally responsible for the substantive offenses committed by another conspirator, if those offenses were done in furtherance of the conspiracy and were reasonably foreseeable to the defendant, *Pinkerton* at 647-48, 1184. Although the Court in *Collins* stated (*Collins* at 313) that the quantity determinations for purposes of satisfying the elevated subsections of 841(b) did not technically fit the facts of *Pinkerton*, still, the *Collins* holding was that "*Pinkerton* principles" should be used, *Collins* at 314. At least one pre-*Apprendi* and pre-*Robinson* Sixth Circuit case, *U.S. vs. Capps*, 93-3718, 93-3719,

93,3720, 93-3721 (6th Cir. March 10, 1995) U.S. App. LEXIS 5195 at *20-*21 referred to the lack of a standard for testing whether a drug amount should or should not be attributed to a defendant as a "vacuum", and in the light of this vacuum, directed the District Court to apply those set out in USSG Section 1B1.3. In the case of jointly undertaken criminal activity, whether or not charged as conspiracy, a defendant is responsible for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity", a standard which is substantially similar to that offered by *Pinkerton*.

Pinkerton has been held to be constitutionally mandated, *U.S. vs. Alvarez*, 755 F.2d 830 (11th Cir. 1985), suggesting also that *Pinkerton* might, in certain cases, be insufficient to protect due process concerns.

The matter of attribution of drug amounts to a conspirator is not addressed by 21 USC Section 841 or Section 846, the two statutes which, in tandem, have resulted in a life sentence for Petitioner. Neither one nor the two together addresses the question of whether drug-quantity findings must be defendant-specific.

The Sixth Circuit's ruling in *Robinson* violated the spirit if not the letter of its prior holding in *U.S. vs. Pruitt*, 156 F.3d 638 (6th Cir. 1998), *cert. denied* January 11, 1999. In *Pruitt*, that court effectively imposed the *Pinkerton* limitation which was said to " . . . provide[s] adequate protection against the possibility that a less culpable, 'small-time' seller of drugs

will be caught up in the sweep of Section 841(b) due to the acts of co-conspirators", *Pruitt* at 645. Characterizing this language in *Pruitt* as dicta (*Robinson* at 638, App. 9), the Sixth Circuit in *Robinson* eliminated the *Pinkerton* limitation and upheld Petitioner's life sentence.

Robinson cleanly frames the conspiracy-wide/defendant-specific drug-quantity-attribution question. The jury focused in on it, and it was apparently critical to their determination that the 5-kilogram threshold had been met. This uncertainty has existed at least since the previously cited *Capps* decision of 1995. The stakes for Mr. Robinson, a relatively young man, and doubtless for many others, are high.

CONCLUSION

The Court should grant the writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

PAUL D. CROSS
CLEMENTS AND CROSS
Attorney for Petitioner
Post Office Box 99
Monteagle, TN 37356
(931) 924-2060

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0418p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* CHRIS ROBINSON, *Defendant-Appellant.*	No. 07-5474

Appeal from the United States District Court
for the Eastern District of Tennessee at Winchester.
No. 06-00004 – Curtis L. Collier, Chief District Judge.

Argued: September 17, 2008

Decided and Filed: November 24, 2008

Before: GUY, BATCHELDER, and
McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Paul D. Cross, CLEMENTS & CROSS, Monteagle, Tennessee, for Appellant. Perry H. Piper, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee. **ON BRIEF:** Paul D. Cross, CLEMENTS & CROSS, Monteagle, Tennessee, for Appellant. Perry H. Piper, ASSISTANT UNITED

STATES ATTORNEY, Chattanooga, Tennessee, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Defendant-Appellant Chris Robinson appeals his conviction and sentence for conspiracy to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. Robinson argues that: (1) the district court erroneously instructed the jury to determine the quantity of cocaine "involved in the conspiracy" instead of the quantity individually attributable to him; (2) the district court failed to charge a violation of 21 U.S.C. § 841(b)(1)(C) as a lesser-included offense; (3) the evidence was insufficient to prove his participation in a conspiracy; and (4) there was a prejudicial variance between the indictment and the proof at trial. Finding no merit in any of these contentions, we AFFIRM.

I. BACKGROUND

A grand jury indicted Robinson for his role in a conspiracy to distribute five or more kilograms of cocaine in the Eastern District of Tennessee from December 2003 through March 2006. At trial, the primary evidence against Robinson consisted of alleged co-conspirator Juan Valentin's testimony and a series of recorded telephone conversations between

Valentin and Robinson that DEA officers intercepted from Valentin's cell phone over a period of 88 days, beginning on May 5, 2005.

Valentin testified that beginning in December 2003, he developed "a business relationship" with Robinson in which the two of them worked together to sell cocaine. According to Valentin, he sold cocaine to Robinson "once or twice a week" in various quantities, sometimes on credit. The quantity he most frequently sold to Robinson was four-and-a-half ounces, which Valentin described as a "regular," and the largest single quantity exchanged between them was half a kilogram. Besides purchasing and distributing cocaine, Robinson helped the conspiracy in other ways, Valentin explained. Robinson introduced Valentin to Troy Allison, who became one of Valentin's "good customer[s]" of cocaine.[1] Valentin testified that Robinson once accompanied him to Memphis, Tennessee, to pick up "a couple kilos" of cocaine.

Most of the recorded telephone conversations consist of Robinson's ordering various quantities of cocaine.[2] But the calls reveal other aspects of

---

[1] Troy Allison testified that Robinson had introduced him to Valentin. Allison purchased "a quarter kilo" of cocaine from Valentin upon meeting him and continued to buy from him after that. Allison "ultimately buil[t] up to" buying one kilogram of cocaine at a time from Valentin, with his largest single purchase being two kilograms.

[2] In the 14 conversations played for the jury, Valentin and Robinson discuss a minimum total of 38-and-a-half ounces of cocaine.

Robinson's involvement with the business: Robinson twice warns Valentin about police investigation into Valentin's activities; Valentin several times asks Robinson to help collect money from individuals whom Valentin had given cocaine on credit; and Valentin on one occasion discusses with Robinson how to retrieve a safe full of cash from a car impounded by the police.

After the presentation of all evidence, the district court charged the jury, in part:

> If you determine defendant is guilty of the offense charged in Count 1, you must then determine whether that offense involved the particular quantity of drugs charged in the indictment. In Count 1 defendant is charged with conspiring to distribute 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine hydrochloride. On the verdict form I have asked you to answer some questions about the amount of the mixture and substance containing a detectable amount of cocaine hydrochloride in this offense. In determining the amount of controlled substance involved in each of these crimes, you should consider all of my previous instructions regarding the consideration of evidence. You should only answer yes to one of these questions on the verdict form if you determine, first, that defendant is guilty beyond a reasonable doubt of the particular offense charged in the indictment, and, second, that the government has proven

> beyond a reasonable doubt that the offense involved the specified quantity of a mixture and substance containing a detectable amount of cocaine hydrochloride listed in the question.

Question 1(A) of the verdict form directed the jury to complete the following sentence: "We, the jury, unanimously find that the defendant, ___ (IS NOT/IS) guilty of the offense charged in Count 1 of the Indictment." If the jury answered "IS guilty" to Question 1(A), they were directed to answer "Yes" or "No" to Question 1(B): "Do you, the jury, unanimously find the Government has proved beyond a reasonable doubt that the offense charged in Count 1 of the Indictment involved five kilograms or more of a mixture or substance containing cocaine hydrochloride?" If the jury answered "No" to Question 1(B), they were asked to answer Question 1(C): whether the jury found the quantity of cocaine to be at least 500 grams.

During their deliberations, the jury sent a question to the court inquiring "whether Mr. Robinson must have knowledge of the selling of 5 kilograms of cocaine hydrochloride or if he has to have direct involvement with selling 5 kilograms of cocaine hydrochloride." Robinson's counsel argued "that knowledge is required" and "that the answer should be yes." The district court, however, responded:

> With respect to the conspiracy, the instructions indicate that the government must prove that two or more persons conspired or

> agreed to commit the crime of distributing cocaine hydrochloride, the defendant knowingly joined the conspiracy, and the defendant voluntarily and intentionally participated in the conspiracy. Again, the essence of the conspiracy is the agreement, not the accomplishment of the act.
>
> Concerning the drug quantities, you are merely to determine what quantity was involved in the conspiracy the defendant participated in, in the event you find he participated in a conspiracy.

The jury returned a verdict of guilty and found that the quantity of cocaine involved in the conspiracy was five kilograms or more. The district court imposed a sentence of life imprisonment, and Robinson timely appealed his conviction to this Court.

II. ANALYSIS

A. Drug Quantity Instruction

"This court reviews a district court's 'actions in responding to questions from the jury' for abuse of discretion." *United States v. Davis,* 490 F.3d 541, 548 (6th Cir. 2007) (quoting *United States v. August,* 984 F.2d 705, 712 (6th Cir. 1992)). "This circuit has set a high standard for reversal of a conviction on the grounds of improper instructions." *United States v. Khalil,* 279 F.3d 358, 367 (6th Cir. 2002) (quoting *United States v. Sheffey,* 57 F.3d 1419, 1429 (6th Cir. 1995)). "A reviewing court may reverse a judgment only if the instructions, viewed as a whole, were

confusing, misleading and prejudicial." *Id.* (quoting *United States v. Clark*, 988 F.2d 1459, 1468 (6th Cir. 1993)).

In its initial instructions, and again in response to the jury's question, the district court directed the jury to determine the quantity of cocaine "involved in the conspiracy." These instructions tracked the language of 21 U.S.C. § 841(b)(1)(A), which provides:

> *In the case of a violation of* [21 U.S.C. § 841(a)] *involving* . . . 5 kilograms or more of a mixture or substance containing a detectable amount of . . . cocaine . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release.

(Emphasis added).[3] 21 U.S.C. § 841(a)(1) makes it "unlawful for any person knowingly or intentionally – to . . . distribute . . . a controlled substance." 21 U.S.C. § 846 in turn provides: "Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The district

---

[3] Robinson has two prior convictions for felony drug offenses.

court thus instructed the jury that the relevant quantity determination is of the quantity involved in the violation of 21 U.S.C. § 841(a) – in this case, a conspiracy to distribute cocaine. The jury's finding that the quantity equaled or exceeded the threshold amount of five kilograms triggered a mandatory life sentence for Robinson.

Citing our decision in *United States v. Pruitt,* 156 F.3d 638 (6th Cir. 1998), Robinson argues that a drug conspirator is culpable only for quantities personally attributable to him. The issue in *Pruitt,* however, was "whether a conspiracy involving multiple overt acts is nonetheless 'a violation' of [21 U.S.C.] § 841(a)" such that the drug quantities from those multiple acts can be aggregated for sentencing under 21 U.S.C. § 841(b)(1)(A). *Id.* at 644. This Court answered the question in the affirmative, noting that "a conspiracy is a single, unified offense" and that "the traditional rule . . . treats a conspiracy as a whole." *Id.* We thus interpreted 21 U.S.C. § 841(b)(1)(A) to focus on the threshold quantity involved in the entire conspiracy.

Robinson nonetheless contends that other language from that opinion supports his position. He points, for example, to our observation in *Pruitt* that "[w]hile a person who participates in a drug conspiracy does not necessarily agree to a specific amount in advance, no defendant may be held responsible for acts beyond the scope of his or her participation in the conspiracy." *Id.* at 644-45 (citing *United States v. Myers,* 102 F.3d 227, 237 (6th Cir. 1996) (citing in turn *Pinkerton v. United States,* 328 U.S. 640, 646-47

(1946))). "[T]his rule," we explained, "provides adequate protection against the possibility that a less culpable, 'small-time' seller of drugs will be caught up in the sweep of § 841(b) due to the acts of coconspirators." *Id.* at 645. We also observed that "the district court included only amounts for which [the appellant] was directly responsible, rather than imputing to him the acts of other defendants, despite conviction on the conspiracy count." *Id.*

These statements do not help Robinson as much as he would like. Again, the issue in *Pruitt* was whether a conspiracy comprising multiple transactions was a single violation of 21 U.S.C. § 841(a). The issue was not whether the appellant was culpable for acts of his co-conspirators, and any pronouncements on that topic are dicta. Moreover, that portion of *Pruitt* turned on an analysis of *Pinkerton*. Although our *Pinkerton* analysis was correct, it is inapplicable here. *See United States v. Collins,* 415 F.3d 304, 313 (4th Cir. 2005) ("The principles outlined in *Pinkerton* . . . have no applicability to a conviction under § 846. *Pinkerton* principles are relevant when a conspirator is charged with a substantive offense arising from the actions of a co-conspirator, not when a conspirator is charged with conspiracy."). It is true that a conspirator is liable for the substantive offenses of his co-conspirators only if those offenses are, among other things, reasonably foreseeable to him. *Pinkerton,* 328 U.S. at 647-48. But this principle is distinct from the equally established rule that conspiracy is an inchoate offense that needs no substantive offense for

its completion. *Iannelli v. United States,* 420 U.S. 770, 777-78 (1975). The district court here was correct to remind the jury that "the essence of the conspiracy is the agreement, not the accomplishment of the act." *See United States v. Spearman,* 186 F.3d 743, 746 (6th Cir. 1999) ("An overt act need not be proven in a § 846 conspiracy.") (quoting *United States v. Bourjaily,* 781 F.2d 539, 544 (6th Cir. 1986)).

Our holding in *Pruitt* affirms this understanding of drug conspiracies. We distinguished culpability for the conspiracy itself from culpability for the substantive offenses of co-conspirators. Although a "small-time" drug seller may not be responsible for all the transactions or actions of his associates, he is responsible for the conspiracy in which he participated. While we observed that the district court included only amounts for which it found the appellant directly responsible, we noted this fact only inasmuch as it demonstrated that he was not improperly held culpable for the substantive offenses of his co-defendants. *Pruitt,* 156 F.3d at 645. And we recognized that 21 U.S.C. § 841(b)(1)(A) prescribes mandatory sentences for "a violation" – including a conspiracy – "involving" certain threshold amounts of drugs. *Id.* Accordingly, the quantity instructions here did not improperly lead the jury to convict Robinson for the substantive acts of his co-conspirators.

Similarly unavailing is Robinson's suggestion that the quantity instructions violated the rule articulated by the Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Under *Apprendi,* "[o]ther

than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Here, the "fact" that increases the default penalty for a conspiracy to distribute drugs is the quantity of drugs involved in the conspiracy.

The First Circuit has noted that *Apprendi* did not overrule the Supreme Court's earlier decision that

> as long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum *applicable to that conspiracy,* the court may "determine both the amount and the kind of 'controlled substances' for which [the] defendant should be held accountable – and then . . . impose a sentence that varies depending upon amount and kind."

Derman v. United States, 298 F.3d 34, 42 (1st Cir. 2002) (quoting *Edwards v. United States,* 523 U.S. 511, 513-14 (1998)) (emphasis in original). The jury need only determine that the defendant participated in a conspiracy involving "a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum." *Id.* at 43. Most other circuits have agreed that *Apprendi* is satisfied where the jury finds, beyond a reasonable doubt, the quantity of drugs involved in the conspiracy as a whole

under 21 U.S.C. § 841(b)(1)(A).[4] *See United States v. Phillips,* 349 F.3d 138, 142-43 (3rd Cir. 2003), *vacated and remanded on other grounds sub nom. Barbour v. United States,* 543 U.S. 1102 (2005), *United States v. Turner,* 319 F.3d 716, 722-23 (5th Cir. 2003), *United States v. Knight,* 342 F.3d 697, 710 (7th Cir. 2003), *United States v. Stiger,* 413 F.3d 1185, 1192-93 (10th Cir. 2005), *vacated and remanded on other grounds sub nom. Mack v. United States,* 543 U.S. 1107 (2005); *but see United States v. Collins,* 415 F.3d 304, 313-14 (4th Cir. 2005) and *United States v. Banuelos,* 322 F.3d 700, 704-05 (9th Cir. 2003).

Here, the district court had no occasion to determine the amount or kind of drugs for which Robinson was personally responsible because there was no range within which the court had discretion to choose a sentence; the quantity of cocaine involved in the conspiracy and Robinson's prior felony drug convictions triggered a mandatory life sentence. Therefore, because the jury found beyond a reasonable doubt that Robinson had participated in a conspiracy that involved five or more kilograms of cocaine, there can be no *Apprendi* error. *See Derman,* 298 F.3d at 42-43.

Viewed under the abuse-of-discretion standard, the district court's response to the jury's question was

---

[4] We have previously adopted this view in unpublished opinions. *See United States v. Alaniz,* 75 F. App'x 344, 351-52 (6th Cir. 2003); *United States v. Grooms,* 194 F. App'x 355, 362 (6th Cir. 2006).

not "confusing, misleading and prejudicial." *Khalil,* 279 F.3d at 367. Given that the court's instruction was faithful to the language of 21 U.S.C. § 841(b)(1)(A), Robinson's argument that a different answer was required does not overcome our "high standard for reversal of a conviction on the grounds of improper instructions." *Id.*

B. Lesser-Included-Offense Instruction

Robinson argues that the district court should have charged a violation of 21 U.S.C. § 841(b)(1)(C) (distribution of cocaine with no finding of a threshold quantity) as a lesser-included offense. By failing to do so, Robinson insists, the court deprived the jury of a "third option" and presented them with an "all-or-nothing choice."

Robinson concedes that he did not request such a charge and that review on this issue is for plain error. *See United States v. Jones,* 403 F.3d 817, 821 (6th Cir. 2005) ("[W]here a 'defendant neither requested nor submitted a lesser-included-offense instruction, and did not object to the instructions given by the trial judge, the jury instructions are reviewable only for plain error.'") (quoting *United States v. Donathan,* 65 F.3d 537, 540 (6th Cir. 1995)). "Under the plain error standard, we may reverse if (1) there was error that (2) was plain, (3) affected a substantial right, and (4) 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Martin,* 520 F.3d 656, 658 (6th Cir. 2008) (quoting

United States v. Oliver, 397 F.3d 369, 378 (6th Cir. 2005) (citing *United States v. Olano,* 507 U.S. 725, 732 (1993))).

> A criminal defendant is entitled to an instruction on a lesser-included-offense if: (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) the evidence would support a conviction on the lesser offense; and (4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser.

United States v. Colon, 268 F.3d 367, 373 (6th Cir. 2001) (quoting *United States v. Monger,* 185 F.3d 574, 576 (6th Cir. 1999)).

Because Robinson never requested a lesser-included-offense instruction, he did not satisfy the first prong of *Colon* and cannot prove any error, much less plain error. Moreover, Robinson's rights were not prejudiced; the verdict form required the jury to determine beyond a reasonable doubt whether the threshold amounts of five kilograms or 500 grams were involved in the conspiracy. An answer of "No" to both of the quantity interrogatories necessarily would have meant that the jury did not find either of the threshold amounts. The verdict form thus provided a "third option" by allowing the jury to convict Robinson of a conspiracy that did not involve any particular quantity of cocaine.

C. Sufficiency of the Evidence

Robinson argues that the evidence was insufficient to prove the existence of a conspiracy.[5] "In determining the sufficiency of the evidence to support a guilty verdict 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Martin,* 520 F.3d at 660 (quoting *United States v. Pearce,* 912 F.2d 159, 161 (6th Cir. 1990) (quoting in turn *Jackson v. Virginia,* 443 U.S. 307, 319 (1979))).

To establish a violation of 21 U.S.C. § 846, "the government must prove, beyond a reasonable doubt, '(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.'" *United States v. Caver,* 470 F.3d 220, 232 (6th Cir. 2006) (quoting *United States v. Gibbs,* 182 F.3d 408, 420 (6th Cir. 1999)). Drug conspiracies "often assume[ ] a vertical pattern of distribution, where each successive distributor sells a lower volume to any particular customer. . . . [A]n agreement to supply drugs to a given area can be inferred from the interdependence of the enterprise." *Id.* at 233. "In a drug distribution 'chain' conspiracy, it is enough to show that each member of the conspiracy realized that he was participating in a joint venture,

---

[5] Robinson does not challenge the sufficiency of the evidence regarding the threshold quantity of cocaine.

even if he did not know the identities of every other member, or was not involved in all the activities in furtherance of the conspiracy." *United States v. Martinez,* 430 F.3d 317, 332-33 (6th Cir. 2005). "'[E]vidence of repeat purchases provides evidence of more than a mere buyer-seller relationship,' and the quantity of drugs may also support an inference of conspiracy." *Id.* at 333 (quoting *United States v. Brown,* 332 F.3d 363, 373 (6th Cir. 2003)). Also, the "trust involved" in delivering drug quantities on credit "suggests more than a buyer-seller relationship." *United States v. Nesbitt,* 90 F.3d 164, 167 (6th Cir. 1996).

The evidence was sufficient to show that Robinson conspired with Juan Valentin and others to distribute cocaine. Valentin testified that he and Robinson shared a "business relationship" and that they worked together to sell cocaine. Robinson purchased drugs from Valentin once or twice a week, sometimes on credit, over a period of several years. On at least one occasion, Robinson accompanied Valentin to a source city to pick up "a couple kilos" of cocaine. Robinson helped collect money other buyers owed Valentin. He warned Valentin about police activity. He conferred with Valentin about how to recover drug proceeds from an impounded car. Robinson introduced Troy Allison to Valentin, and Allison became one of Valentin's "good customer[s]." From this evidence a rational trier of fact could find that there was an agreement to violate drug laws, that Robinson knowingly and intentionally joined the

conspiracy, and that Robinson participated in the conspiracy.

D. Variance

Robinson argues that there was a prejudicial variance between the indictment and the proof at trial because the indictment alleged one large conspiracy while the evidence demonstrated several smaller conspiracies. "The court of appeals reviews the question of whether a variance has occurred *de novo*."[6] *Caver*, 470 F.3d at 235. "Within the context of a conspiracy, a variance constitutes reversible error only if a defendant demonstrates that he was prejudiced by the variance and that the 'indictment alleg[d] one conspiracy, but the evidence can reasonably be construed *only* as supporting a finding of multiple conspiracies.'" *Id.* at 235-36 (quoting *United States v. Warner*, 690 F.2d 545, 548 (6th Cir. 1982)) (emphasis in original). "In making this determination, the evidence must be viewed in the light most favorable to the government." *Id.*

---

[6] If the issue of variance is not raised at trial, however, review is for plain error. *Caver*, 470 F.3d at 235. The parties have not indicated whether Robinson raised this issue at trial or, if he did, where in the record it appears. We find that, under either standard of review, Robinson has not shown that a variance occurred or that his rights were prejudiced.

1. *Existence of a Single Conspiracy*

"To prove a single conspiracy, the government need only show that each alleged conspirator had knowledge of and agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Smith,* 320 F.3d 647, 653 (6th Cir. 2002), *vacated and remanded on other grounds,* 510 U.S. 1180 (2005). "[A] single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy." *Warner,* 690 F.2d at 549. Drug conspiracies "are often 'chain' conspiracies" which "normally involve numerous sales and resales of drugs until they reach the ultimate consumers." *Id.* "Because the success of participants on each level of distribution is dependent upon the existence of other levels of distribution, each member of the conspiracy must realize that he is participating in a joint enterprise, even if he does not know the identities of many of the participants." *Id.*

Here, the government proved that Robinson knew about and agreed to participate in a collective venture to sell cocaine in eastern Tennessee. The same evidence supporting a finding of Robinson's participation in the conspiracy supports a finding that there was a single conspiracy. Robinson cooperated with both Valentin and "downstream" sellers to maintain a profitable enterprise. Robinson helped Valentin acquire drugs, develop new customers, avoid

police detection, and collect money. These actions support the inference that Robinson wanted to protect Valentin's interests, at least so he could maintain him as a source. Also, Robinson made sure that he had enough cocaine to supply the dealers who were buying from him. The evidence points to a conclusion that there was an "interdependence of the enterprise," *Caver,* 470 F.3d at 233, and we cannot say that the evidence "can reasonably be construed *only* as supporting a finding of multiple conspiracies." *Id.* at 236 (quoting *Warner,* 690 F.2d at 548) (emphasis in original).

2. *Prejudice*

"[E]ven if a variance exists, it does not constitute reversible error 'unless it prejudices [the defendant's] substantial rights.'" *United States v. Lee,* 991 F.2d 343, 349 (6th Cir. 1993) (quoting *United States v. Guerra-Marez,* 928 F.2d 665, 671 (5th Cir. 1991)). "Moreover, 'if the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights.'" *Id.*

Even assuming a variance, Robinson has failed to demonstrate how he has been prejudiced. This is not a case where there could be a danger of "transferred guilt" from evidence of multiple conspiracies in which Robinson was not involved. In any event, even if the evidence proved only multiple conspiracies, the

government has proved Robinson's involvement in at least one of them.

CONCLUSION

For the foregoing reasons, we **AFFIRM** Robinson's conviction and sentence.

United States District Court
Eastern District of Tennessee

UNITED STATES OF AMERICA
v.
CHRIS ROBINSON
a/k/a "WEBB"

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number:
4:06-CR-004-03

Paul D. Cross
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[✓] was found guilty on counts(s) 1, 32, and 34 of the Superseding Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21 U.S.C. §§846 & 841(b)(1)(A)	Conspiracy to Distribute Five Kilograms or More of Cocaine Hydrochloride	12/2003-3/2006	One
21 U.S.C. §§843(b)	Use of a Communication Device	05/19/05 05/24/05	Thirty-Two Thirty-Four

The defendant is sentenced as provided in pages 2 through 6 of this judgment and the Statement of Reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. §3553.

[ ] The defendant has been found not guilty on count(s)__

[ ] Counts ____ [ ] is [ ] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

04/05/2007
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

CURTIS L. COLLIER, Chief
United States District Judge
Name & Title of Judicial Officer

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of LIFE. This sentence consists of a term of Life on Count One, and terms of 48 months on each of Counts 32 and 34, to be served concurrently.

[✓] The court makes the following recommendations to the Bureau of Prisons:

That the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m. [ ] p.m. on _____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 years.

This term consists of a term of 8 years on Count One and terms of 3 years on each of Counts 32 and 34, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of

release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[✓] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set

forth below). The defendant shall also comply with the additional conditions on the attached pages.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The assessment is ordered in accordance with 18 U.S.C. § 3013.

	Assessment	Fine	Restitution
Totals:	$300.00	$	$

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. § 3664.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS:	$_____	$_____	

[ ] If applicable, restitution amount ordered pursuant to plea agreement. $ _____

The defendant shall pay interest on any fine or restitution of more than $2500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [✓] Lump sum payment of $300.00 due immediately, balance due

[ ] not later than _____ , or

[✓] in accordance with [ ] C, [ ] D, or [ ] E or [✓] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in _____ (e.g., equal weekly, monthly, quarterly) installments of $ _____ over a period

of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within 0 (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [✓] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to **U.S. District Court, 200 S. Jefferson St., Room 201, Winchester, TN 37398**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

No. 07-5474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRIS ROBINSON, Defendant-Appellant.	)))))))	ORDER (Filed Feb. 5, 2009)

BEFORE: GUY, BATCHELDER, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

UNITED STATES OF AMERICA, Plaintiff, -versus- CHRIS ROBINSON, Defendant.	:	4:06-CR-4

Chattanooga, Tennessee
October 2, 2006

BEFORE: THE HONORABLE CURTIS L. COLLIER, CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER,
JAMES T. BROOKS,
Assistant United States Attorneys
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

H. GRAHAM SWAFFORD, JR., ESQ.
Swafford, Jenkins & Raines
32 Courthouse Square
Post Office Box 457
Jasper, Tennessee 37347-0457

JURY TRIAL
FIRST DAY OF TRIAL
EXCERPT OF PROCEEDINGS
OPENING STATEMENTS AND TESTIMONY

* * *

[40] A Yes, sir.

Q Now, back in August of '05, what we've talked about earlier – I'm going to hand to you Government's Exhibit 40. Tell me if you recognize Government's Exhibit 40, please, sir. What is Government's Exhibit 40, Agent Sowder?

A It is the 3 kilograms of cocaine that we took from Juan Valentin.

Q And where was that?

A That was in Rutherford County, on August 24th of 2005.

Q August 24th of '05? County seat of Rutherford County is?

A Murfreesboro.

Q Murfreesboro. Very good. Tell the jury how it came about that you-all stopped Juan Valentin with these 3 kilos of coke.

A What took place on August 24th is – we went down on July 31 – we were able to spin up Memphis DEA up on his source of supply. We got a phone call – I personally got a phone call from Special Agent Jim Shires with DEA in Memphis stating that his guy, meaning Mr. Giovani Caraballo, had had phone conversations with Mr. Juan Valentin stating that he was getting ready to make a trip to pick up cocaine in Memphis to take back to Tullahoma.

* * *

[49] Q Okay. And at some point – let me ask you this [50] question – did you know that Mr. Valentin – back before the August 2005 incident, did you and Agent Ledford learn that Mr. Valentin was coming back with 5 kilos of cocaine?

A Oh, yes, sir.

Q And that was based upon the wire?

A Yes, sir.

Q And what did you want to do at that point?

A I wanted to take him off.

Q Five kilos was the threshold quantity that we needed?

A Yes, sir.

Q And what happened when you wanted to take him off?

A Unfortunately there's people higher in the office making the decisions. Also, like I said, with Memphis DEA, their supervisors and my supervisors, they were really trying to get into Mexico, into their source of supply.

Q Okay. So did they allow you-all to take down this 5 kilos of coke?

A No, sir.

* * *

[61] Q Any connection with – At some point in time, they go to Memphis and get 3 kilos and a hundred pounds of marijuana. Any connection between my client and that?

A Like – Again, I don't know where the cocaine and marijuana was going back to once it got back.

Q To your knowledge –

A To my knowledge, no.

Q – the answer is no? Now, then, in regards to Exhibits 47 and 50, we have what appears to be 5 K of cocaine and the marijuana. No connection between my client – between these items. Is that correct?

A Yes, sir. Again, we have no idea who it was going back to once it got back.

* * *

[66] Q You say that the 3 kilos of coke that we have here and the other kilos of coke, that Mr. Robinson had no connection to that?

A No, sir, I did not say that he had no connection to it.

Q Okay. Well, Mr. Swafford asked you what connection he had to that. What involvement, what connection, did he have to this coke?

A This cocaine was coming back to Tullahoma to be distributed among Mr. Valentin's coconspirators, I believe.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	4:06-CR-4
-versus-	:	
CHRIS ROBINSON,	:	
Defendant.	:	

Chattanooga, Tennessee
October 3, 2006

BEFORE: THE HONORABLE CURTIS L. COLLIER, CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER,
JAMES T. BROOKS,
Assistant United States Attorneys
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

H. GRAHAM SWAFFORD, JR., ESQ.
Swafford, Jenkins & Raines
32 Courthouse Square
Post Office Box 457
Jasper, Tennessee 37347-0457

JURY TRIAL
SECOND DAY OF TRIAL
EXCERPT OF PROCEEDINGS
TESTIMONY, CLOSING ARGUMENTS,
AND JURY CHARGE

* * *

[254] MR. PIPER: Thank you.

I do want to talk briefly about quantity. Five kilos of powder cocaine. Forget about the two keys they pick up in Memphis. Forget about the half key or quarter key he gets with Chris – with Troy Allison. Let's just look at the four and a half ounces that he primarily got every week from December of '03, which is the dates in the conspiracy, to – and he stopped in August of '05. Doesn't go all the way to March of '06. So you've got roughly – Let's say it's 18 months, or 75 weeks. And if I think – 75 times 4 is 300 ounces. You heard testimony there's 36 ounces in a kilogram. So therefore he's roughly at 8 or 9 ounces [sic]. I asked David Sowder to figure this out in his head. Isaac Newton here had a hard time with that. But I'm giving him a hard time. When he was on the stand, he had kind of balked a [255] little bit about doing the math in his head.

* * *

[269] If you determine defendant is guilty of the offense charged in Count 1, you must then determine whether that offense involved the particular quantity of drugs charged in the indictment. In Count 1 defendant is charged with conspiring to distribute 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine hydrochloride. On the verdict form I have asked you to answer some questions about the amount of the mixture and substance containing a detectable amount of cocaine hydrochloride in this offense. In determining the amount of controlled substance involved in each of these crimes, you should consider all of my previous instructions regarding the [270] consideration of evidence. You should only answer yes to one of these questions on the verdict form if you determine, first, that defendant is guilty beyond a reasonable doubt of the particular offense charged in the indictment, and, second, that the government has proven beyond a reasonable doubt that the offense involved the specified quantity of a mixture and substance containing a detectable amount of cocaine hydrochloride listed in the question.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

UNITED STATES OF AMERICA, Plaintiff, -versus- CHRIS ROBINSON, Defendant.	4:06-CR-4

Chattanooga, Tennessee
October 3, 2006

BEFORE: THE HONORABLE
CURTIS L. COLLIER,
CHIEF UNITED STATES
DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER,
JAMES T. BROOKS,
Assistant United States Attorneys
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

H. GRAHAM SWAFFORD, JR., ESQ.
Swafford, Jenkins & Raines
32 Courthouse Square
Post Office Box 457
Jasper, Tennessee 37347-0457

JURY TRIAL
SECOND DAY OF TRIAL
EXCERPT OF PROCEEDINGS

DISCUSSION REGARDING
COMMUNICATION FROM THE JURY

[2] (The proceedings continued outside the presence of the jury, as follows:)

THE COURT: Please be seated.

A communication has been received from the jury. The communication asks whether the defendant must have knowledge or direct involvement with selling a drug quantity. From the question, it appears that they have – the question relates to the drug quantity charge. The court has prepared an instruction that, first of all, deals with the conspiracy charge and then, secondly, the drug quantity charge.

Mr. Piper, have you had a chance to review the court's proposed response?

MR. PIPER: I have, Your Honor.

THE COURT: Does the government have any suggestions or objections?

MR. PIPER: We have no objection to it, Your Honor. I thought that the court might want to add some "reasonable foreseeability" language. I talked it over with Mr. Brooks. He does not believe the Court needs to do that, that the suggested response by the court is sufficient.

THE COURT: The court has always been impressed by Mr. Brooks' wisdom and maturity. I think this is another example of it.

Mr. Swafford?

MR. SWAFFORD: Nobody has ever been impressed with my [3] academics, but I've been around a long time.

Respectfully, we feel that knowledge is required. And we insist that although it talks of 5 K in the question, we feel that this question is – basically goes to this issue of the conspiracy. We feel that the answer should be yes. And we're asking that the "yes" be as effusive as we can possibly get you to do. But being all that as it may, I've got this U. S. v. Rystick case. It says the government must prove an agreement between two or more acting together to commit. So that is one of the keys to a conspiracy; you've got to have participation, agreement, and some type of knowledge. Those are the three elements that were there. And we feel that as a matter of law you can't be convicted of a conspiracy if you just don't know. Might look bad, but, still, you don't know. I guess that was one of the things I was trying to point out about the famous Red Hot Truck Stop comment – "Gosh, you

know, we didn't know anything was going on out there." I insist that that basically is a defense to conspiracy – we didn't know. Thank you.

THE COURT: Well, on the first paragraph of the proposed instruction, the last sentence says the essence of the conspiracy is the agreement. So this reemphasizes with the jury that to find the defendant guilty of the conspiracy, you must find that he voluntarily and intentionally joined some conspiracy. Then the second paragraph tells the jury that if [4] they determine that he did participate in a conspiracy, they are called upon to determine what was the quantity of drugs involved in the conspiracy the defendant participated in. That conspiracy the defendant participated in would have to be the conspiracy that he agreed, not the conspiracy that may have taken on others with which he had no knowledge and with which he was not in agreement with. So the Court believes that this instruction does correctly state the law and also responds to the jury's question. Let me go ahead, then, and sign the communication, and I'll have Ms. Palmer deliver the communication to the jury.

MR. PIPER: Judge, could you read the communication into the record?

THE COURT: Did I do it?

MR. PIPER: Yes, sir.

THE COURT: I did not. I can if you'd like me to.

MR. PIPER: I would, Your Honor. I'm talking about the Court's communication back to the jury.

THE COURT: "You have asked whether Mr. Robinson must have knowledge of the selling of 5 kilograms of cocaine hydrochloride or if he has to have direct involvement with selling 5 kilograms of cocaine hydrochloride. With respect to the conspiracy, the instructions indicate that the government must prove that two or more persons conspired or agreed to commit the crime of distributing cocaine hydrochloride, the [5] defendant knowingly joined the conspiracy, and the defendant voluntarily and intentionally participated in the conspiracy. Again, the essence of the conspiracy is the agreement, not the accomplishment of the act.

"Concerning the drug quantities, you are merely to determine what quantity was involved in the conspiracy the defendant participated in, in the event you find he participated in a conspiracy."

MR. PIPER: Thank you, Your Honor.

MR. SWAFFORD: Thank you.

THE COURT: Ms. Palmer, you may deliver this to the jury. And you can put us in recess.

END OF EXCERPT

I, Elizabeth B. Coffey, do hereby certify that I reported in machine shorthand the proceedings in the

above-styled cause, and that this transcript is an accurate record of said proceedings.

Elizabeth B. Coffey,
Official Court Reporter